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LEE LYE POH v. PP & OTHER APPEALS

HIGH COURT MALAYA, GEORGETOWN
MOHD RADZI ABDUL HAMID JC
[CRIMINAL APPEALS NO: PA-41S-19-12-2019,
PA-41S-20-12-2019 & PA-41S-21-12-2019]
B 8 JANUARY 2020

CRIMINAL LAW: *Offences – Gaming offences – Charge under s. 7(1) of Common Gaming Houses Act 1953 – Accused persons caught playing game on simulator machine at entertainment centre – Whether elements of offence established – Whether act of playing game was proven to be act of gaming – Whether unlicensed simulator machine – Whether involved payment of money or money's worth – Whether entertainment centre was 'public place' – Whether 'public place' refers to act of gaming in public place that is not common gaming house – Whether licenced to offer general entertainment – Whether accused persons raised reasonable doubt against prosecution case*

CRIMINAL PROCEDURE: *Sentence – Appeal against – Charge for gaming offences under s. 7(1) of Common Gaming Houses Act 1953 – Accused persons caught playing game on simulator machine at entertainment centre – Whether offence warranted both sentence of imprisonment and maximum fine – Factors considered by court – Aged accused persons – Whether exposed to serious health risks due to Covid-19 infections in prisons – Whether maximum fine reserved for serious and repeat offenders – Whether fine ought to be reduced*

WORDS & PHRASES: *'public place' – Section 7(1) of Common Gaming Houses Act 1953 ('Act') – Whether 'includes' in s. 7(4) of Act read together with '... and any place to which the public has or may have access' expands scope of spaces or places that can be 'public place' – Whether 'public place' refers to act of gaming in public place that is not common gaming house – Whether extends to all places that public has access*

G The appellants were each charged for an offence under s. 7(1) of the Common Gaming Houses Act 1953 ('Act') and punishable under s. 7(2) of the same Act. At the conclusion of the trial, the Magistrate, having found that the prosecution had proven its case beyond reasonable doubt, found each of the appellant guilty of the offence as charged and sentenced them to an imprisonment term of five months and the maximum fine of RM5,000. In H this appeal against the conviction and sentence, the appellants contended, *inter alia,* that (i) the 'Pusat Hiburan', where the appellants were found to be playing games, was not a public place falling within the scope of s. 7 of the Act; (ii) the 'Treasure Frog' machine was not a gaming machine since there was no evidence that the appellants had played the machine for money or I money's worth; (iii) payment of money or money's worth is a matter to be

proved before an offence can be established under s. 7 of the Act; (iv) there was no evidence that the appellants had paid any money to obtain the e-token card that was required before the game was played and there was no evidence that all the appellants had in their possession the e-token card when they were arrested and therefore, the act of gaming was not proven; and (v) the evidence of SP2, the raiding officer, and SP3, a gazetted expert police witness, did not prove that the appellants actually played the 'Treasure Frog' simulator. The appellants also submitted that the sentences were excessive since all the appellants were first offenders and there was no justification for both imprisonment and maximum fine to be meted out against the appellants.

Held (dismissing appeals against conviction; setting aside imprisonment sentence and substituting sentence of fine of RM5,000 to RM1,500 for each appellants, in default one month imprisonment):

(1) The word 'includes' in s. 7(4) of the Act, when read together with the words '... *and any place* to which the public has or may have access', have the effect of expanding the scope of the spaces or places that can be a public place rather than restricting it only to the places that appear in that provision. Section 3 of the Interpretation Acts 1948 and 1967 defines 'public place' to include not only areas used for access but also other locations and facilities to which the public has access. Further, the space that can be considered a public place is not restricted and is limitless for as long as the place is of general resort and can be accessed either by payment or by public access. Thus, the words '*... and any place* to which the public has or may have access' in s. 7(4) of the Act, does not serve to limit the scope of public places to only those areas described before that but extends also to all other places where the public has access whether admission is through payment or gratuitously. (paras 17 & 18)

(2) The 'Pusat Hiburan' was a public place because (i) it was situated in a shopping mall that was accustomed to be visited by the public; (ii) there was no evidence that access to the place was limited only by way of invitation, payment of access fee or membership; and (iii) each of the appellants' own evidence that they had walked into and wandered within the 'Pusat Hiburan'. The word 'place' as used in s. 6 refers to the act of gaming in a common gaming house which can be found or located in an indoor or outdoor pace whilst s. 7 of the Act refers to the act of gaming in the public place that is not a common gaming house. The 'Pusat Hiburan' is not a common gaming house since it was licensed to offer general entertainment and games including kiddie rides and snooker. (paras 19 & 20)

(3) It is clear by s. 2 of the Act that the game played must be one that involves (i) the element of chance or a mix of chance and skill; and (ii) is played for money or money's worth. To play the 'Treasure Frog', a player must buy credit points credited into a magnetic e-token card. The use of the credit points in the e-token card, the value of wager or bet for each game played and the evidence of SP3 were clear evidence of the fact that the game was played for money or money's worth. The word 'may' in the definition of 'gaming machine' means that for as long as there is an expectation or prospect of payment, actual payment may not be proved. Therefore, whether the operator actually pays the winnings on the form of money or money's worth was not the determinant factor, it was whether there was an expectation or prospect of payment of money or money's worth if the player wins the game. The expectation or prospect gives it the character of a gaming machine. (paras 21-27)

(4) The token cards were not held by the players but by the operator at the counter. The fact that SP3 did not see any of the appellants paid any monies for the credit points to be loaded to the e-token cards did not negate SP2's evidence that he saw the appellants being engrossed in the game, which meant that the appellants were not just toying with the simulator but was purposefully playing the game. As the payment of money or money's worth need not be proven, the lack of any evidence that the appellants did actually receive any winnings in money or money's worth was therefore not critical in proving the offence. (paras 31 & 32)

(5) There was no evidence that the 'Treasure Frog' simulators were actually licensed by the local authorities. In absence of any direct evidence from the local authorities regarding the licenses and the 'Treasure Frog' simulators, the content and purpose of the 'Treasure Frog' simulator game stood unrebutted. Even if the licenses tendered were to be considered, none of the licenses identified 'Treasure Frog' as simulator game that was licensed. Hence, although the 'Pusat Hiburan' was licensed as an entertainment center, there was no evidence that the 'Treasure Frog' simulator game was actually approved and licensed. The appellants thus had not raised any reasonable doubt in the prosecution's case. (para 34)

(6) The appeals by each of the appellant against conviction was dismissed and the decision of the Magistrate on conviction was affirmed. The offence committed by each of the appellant did not warrant the sentence of both imprisonment and maximum fine. The court took into consideration that (i) each of the appellant was a first offender; (ii) this was not an offence that involved any victim; (iii) this was not an offence

that involved violence; (iv) the appellants were not operators of the game; and (v) they had committed the offence individually and not collectively as a group where bets or wagers were pooled. Additionally, this court took judicial notice that there had been Covid-19 infections in prisons in the state of Penang and as such, incarceration for the first appellant, aged 56, and the second appellant, aged 76, would only expose them to potentially serious health risks. Hence, the sentence of imprisonment was inappropriate and therefore, set aside. The maximum fine of RM5,000 should only be reserved for serious and repeat offenders and was thus excessive. The amount of fine was thus substituted with the amount of RM1,500 for appellant, in default one month imprisonment. (paras 35-39)

Case(s) referred to:
Jamil Dun v. PP [2019] 1 LNS 191 CA ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***
Lee Choo Lai & Ors v. PP [2000] 6 CLJ 253 HC ***(refd)***
Lim Pong Joo v. Regina [1957] 1 LNS 37 HC ***(dist)***
Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd [2010] 1 CLJ 137 FC ***(dist)***
Menteri Hal Ehwal Dalam Negeri v. Raja Petra Raja Kamarudin & Another Appeal [2009] 3 CLJ 513 FC ***(refd)***
Mohd Yusri Mangsor & Anor v. PP [2014] 7 CLJ 897 CA ***(refd)***
Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 HC ***(dist)***
PP v. Chen Geok Len & Anor [1966] 1 LNS 134 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
PP v. Voon Nyuk Tze & Anor [1965] 1 LNS 142 HC ***(refd)***

Legislation referred to:
Common Gaming Houses Act 1953, ss. 2, 6, 7(1), (2), (4)
Income Tax Act 1967, s. 2
Interpretation Acts 1948 and 1967, s. 3

For the appellants - Lee Khai & Lee Huai; M/s Ong and Manecksha
For the respondent - Noor Azura Zulkiflee; DPP

[Editor's note: Appeal from Magistrate's Court; Criminal Trial No: PA-83-1141-10-2018.]

Reported by S Barathi

JUDGMENT

Mohd Radzi Abdul Hamid JC:

Matter Before This Court

[1] For the purposes of this grounds of judgment all the appellants will be collectively referred to as the "appellants" and individually referred to as the "first appellant" (Lee Lye Poh), "second appellant" (Lim Mui Choo) and "third appellant" (Ang Lye Aun). The appeal brought by each of the

appellant is against both conviction and sentence. Each of them was charged for an offence under s. 7(1) of the Common Gaming Houses Act 1953 ("Act") and punishable under s. 7(2) of the same Act. All three cases were tried together before the Magistrate. All of them were arrested at the same place at the same time and charged for the same offence. At the end of the prosecution's case the Magistrate found that the prosecution had established a *prima facie* case against each of the appellant and at the conclusion of the trial, the Magistrate held that the prosecution had proven its case beyond reasonable doubt against each of the appellant and that each of the appellant had failed to raise a reasonable doubt in the prosecution's case. Each of the appellant was found guilty of the offence as charged and were sentenced to an imprisonment term of five months and the maximum fine of RM5,000.

[2] The charge ("charge") against each of the appellant reads as follows:

> Bahawa kamu pada 11.10.2018 jam lebih kurang 2.30 petang, di Pusat Hiburan Keluarga Classic, Cosmic Jaya Sdn. Bhd. (Cosmic Family Entertainment Sdn. Bhd.) No. 33-5-61 Prangin Mall, Jalan Dr. Lim Chwee Leong, Georgetown, di dalam Daerah Timur Laut di dalam Negeri Pulau Pinang, telah didapati bermain judi mesin stimulator di tempat bebas. Oleh itu, kamu telah melakukan satu kesalahan di bawah seksyen 7(1) dan boleh dihukum di bawah seksyen 7(2) Akta Rumah Judi Terbuka 1953.

[3] Since all the appellants were represented by the same counsel, the hearing of all three appeals were heard together. This grounds of judgment will deal with all the three appeals together as the issues presented to this court by learned counsel for all the appellants are same and equally applicable to each of them.

The Law Relating To Appeals

[4] In the case of *Mohd Yusri Mangsor & Anor v. PP* [2014] 7 CLJ 897; [2014] 4 MLJ 875, Mohd Zawawi Salleh JCA (as he then was) had clearly set out the principles pertaining to the powers of an appellate court:

> [4] ... We are mindful that this is a factual based appeal. It is trite that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts by the trial court to which the law entrusts the primary task of evaluation of the evidence. However, there are exceptions. Where:
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> (a) the judgment is based upon a wrong premise of fact or of law;
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> (b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;
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> (c) the trial judge has completely overlooked the inherent probabilities of the case;
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> (d) that the course of events affirmed by the trial judge could not have occurred;

(e) the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or

(f) the trial judge had so fundamentally misdirected himself that one may safely sat that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion, then an appellate court will intervene to rectify that error so that injustice is not occasioned,

then an appellate court will intervene to rectify that error so that injustice is not occasioned (see *Perembun (M) Sdn Bhd v. Conlay Construction Sdn Bhd* [2012] 4 MLJ 149, (CA); *Sivalingam Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545; [1995] 3 MLJ 395 (CA)).

[5] It is trite law as set out by the Supreme Court in the case of *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25; [1985] 2 MLJ 200b that the appellate court should be slow to interfere with a sentence passed by the court below unless it is manifestly wrong. Later in the case of *Jamil Dun v. PP* [2019] 1 LNS 191; [2019] MLJU 179, the Court of Appeal held as follows:

[19] It is trite that an appellate court will be slow to interfere with the sentence imposed by the court below unless (a) the sentence imposed was manifestly excessive or inadequate; (b) that the sentence passed was wrong in the sense of being illegal or unsuitable to the proved facts and circumstances of the case; or (c) there was an error or misdirection in considering the facts and circumstances of the case. An appellate court will not interfere with the sentence merely because it might have passed a different sentence: see *Bhandulananda Jayatilake v. PP* [1982] 1 MLJ 83.

The Appeal

Grounds Of Appeal

[6] All the appellants' petition of appeal rests on the same issues, namely:

(i) that the Magistrate erred in law and in fact in finding the appellants guilty of the offence under the charge;

(ii) that the Magistrate erred in law and in fact in finding that the payment of money or money's worth as provided under s. 7(1) of the Act was not a condition in proving the offence;

(iii) that the Magistrate erred in law and in fact when she failed to consider the evidence of SP3 (the expert witness) that where a game is played without payment of money or money's worth then the act of playing the game cannot be said to be an act of gaming;

(iv) the Magistrate erred in law and in fact in finding that the game "Treasure Frog" which the appellants was found playing was a game of chance not dissimilar to the "roulette" game;

(v) that the Magistrate erred in law and in fact in finding that the "Pusat Hiburan Keluarga Classic, Cosmic Jaya Sdn Bhd" ("Pusat Hiburan") was a public place within the provision of s. 7 of the Act;

(vi) that the Magistrate erred in law and in fact in relying on the hearsay evidence of one ASP Rusli;

(vii) that the Magistrate erred in law and in fact in failing to consider that the "Treasure Frog" game was licensed by the Penang City Council and therefore was not a gaming machine;

(viii) that the Magistrate erred in law and in fact in referring to and relying on legal precedents from Singapore that were based on provisions of the law that were dissimilar to the Act;

(ix) that the Magistrate erred in law and in fact when she found that the appellants' defence were just a bare denial; and

(x) that the Magistrate erred in law and in fact when she failed to justly consider the mitigating factors for the appellants and that the sentence of imprisonment and fine against the appellants was excessive.

Grounds Of Judgment Of The Magistrate

[7] In arriving at her decision to convict the appellants, the Magistrate had: (i) accepted the evidence of SP2 (raiding officer) who testified that he saw the appellants playing the "Treasure Frog" game; (ii) accepted the evidence of SP3 who was a gazetted expert police witness on gaming that the "Treasure Frog" game was a game of skill and chance that involved the element of payment of money or money's worth; (iii) found that the "Pusat Hiburan" was a public place within the provision of s. 7 of the Act since it was located in a shopping mall and had 50 simulator machines; (iv) found that each of the appellant's explanation as to why they were at the entertainment centre as being an afterthought as it was never put to any of the prosecution witnesses; (v) found that the explanation of the first and third appellants that they had just sat at the simulators after the seats were offered by some other person was incredible; (vi) found that the second appellant's explanation that she sat at one of the game simulators to rest after looking for her son and grandchild was not credible since the entertainment area was large and there was no apparent reason why she chose to sit at that particular area; and (vii) found after evaluating the whole of the evidence of each of the appellant and the prosecution, that each of the appellant had in fact played the "Treasure Frog" game.

[8] With regards to the issue of sentencing, the Magistrate held the view that the offence of gambling must be viewed seriously and public policy required that the deterrent sentence be passed against the appellants notwithstanding that they had a family to support and care for.

Hearing Of The Appeal

Submissions By Appellants

[9] At the hearing of the appeal, arguments were presented based on the points stated in the petition of appeal. On the finding of guilt, all the appellants contended, *inter alia*, that (i) the "Pusat Hiburan" was not a public place falling within the scope of s. 7 of the Act; (ii) the "Treasure Frog" machine was not a gaming machine since there was no evidence that the appellants had played the machine for money or money's worth; (iii) payment of money or money's worth is a matter to be proved before an offence can be established under s. 7 of the Act; (iv) there was no evidence that the appellants had paid any money to obtain the E-Token card that was required before the game was played and there was no evidence that all the appellants had in their possession the E-Token card when they were arrested and therefore the act of gaming was not proven; and (v) the evidence of SP2 and SP3 did not prove that the appellants actually played the "Treasure Frog" simulator. On the issue of sentence, learned counsel for the appellants submitted that the sentence of both imprisonment of five months and maximum fine of RM5,000 were excessive since all the appellants were first offenders. There was no justification for both imprisonment and maximum fine to be meted out against the appellants.

Submissions By Respondent

[10] Learned Deputy Public Prosecutor submitted that the decision of the Magistrate was correct after taking into consideration all evidence. It was submitted that the "Pusat Hiburan" was not only a public place by the fact that it was located in the Prangin Shopping Mall but based on each of the appellant's own evidence that they had walked and wandered into the "Pusat Hiburan". The second appellant testified that she was looking for her son and grandchild whilst the first and third appellants testified that after having lunch they had walked and wandered about in the "Pusat Hiburan". It was also submitted that based on the collective evidence of SP2 and SP3, each of the appellants did play the "Treasure Frog" game for money or money's worth.

Deliberations By This Court

Offence Under Section 7(2) Of The Act

[11] According to s. 7(1) and (2) of the Act, a person is said to have committed the offence if such person is found (i) gaming; and (ii) that act of gaming is done in a public place. It is therefore the prosecution's burden to prove these two elements. Before touching on the issue of act of gaming, this court will first deliberate on the issue of whether the "Pusat Hiburan" is a public place.

Whether "Pusat Hiburan Keluarga Classic, Cosmic Sdn Bhd" Is A Public Place

[12] Learned counsel for the appellants submitted that the "Pusat Hiburan" cannot be a public place by looking at the definition of "public place" under s. 7(4) of the Act. Under that provision, a "public place" is defined as:

> (4) In this section the expression "public place" includes public streets, roadways, lanes, and open spaces, and any place to which the public has or may have access.

[13] It was contended that by applying the principle of *ejusdem generis* the expression "... and any place to which the public has or may have access" must mean the same type of places as described before that. In making that contention learned counsel for the appellants referred to the decision in *PP v. Voon Nyuk Tze & Anor* [1965] 1 LNS 142; [1965] 2 MLJ 131; where the court stated that where there are general words following particular and specific words, the meaning of the general words must be confined to and be controlled by the meaning of the particular words. Further reference was also made to the case of *Menteri Hal Ehwal Dalam Negeri v. Raja Petra Raja Kamarudin & Another Appeal* [2009] 3 CLJ 513; [2009] 4 MLJ 484; where it was held that the application of the *ejusdem generis* principle presupposes the identification of a like group of matters. Therefore, it was argued that the characteristic of public streets, roadways, lanes and open spaces are outdoor spaces and not privately owned and as such the words "any place to which the public has or may have access" must also mean public spaces and not privately owned spaces.

[14] It was further argued that in absence of evidence that the "Pusat Hiburan" is a place to which the public has access, that place cannot be regarded as a public place. As decided by the court in *Lee Choo Lai & Ors v. PP* [2000] 6 CLJ 253; [2000] MLJU 223, the court found that since there was no evidence that the restaurant where the alleged offence of gaming was committed was a place which the public had access then the restaurant cannot be regarded as a public place.

[15] Applying the arguments above, learned counsel for the appellants argued that the Magistrate had erred in finding that the "Pusat Hiburan" was a public place merely based on the fact that it was located in a shopping mall that was accessible to the public and that the "Pusat Hiburan" had 50 simulator machines.

[16] With regards to the issue on interpretation of the provision of s. 7(4) of the Act and the principle of *ejusdem generis*, this court would first refer to the Court of Appeal decision in *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283. In determining the scope of the meaning of the word "royalty" under s. 2 of the Income Tax Act 1967, the Court of Appeal had to consider the effect of the word "includes". Idrus Harun JCA speaking for the court held:

[38] The definition of royalty as provided in s. 2 of Act 53 reads as follows: "royalty" includes:

(a) any sums paid as consideration for the use of, or the right to use:

(i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks, or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;

(ii) know-how or information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

(b) income derived from the alienation of any property, know-how of information mentioned in paragraph (a) of this definition, (emphasis added)

[39] This definition undoubtedly gives wide and non-exhaustive interpretation of the word "royalty" as indicated by the use of the word "includes". The word "include" is defined in the *Black's Law Dictionary*, 9th edn, Bryan A. Garner at p. 777 as follows:

> To contain as a part of something ... But some drafters use phrases such as including without limitation and including but not limited to ...

In the *Stroud's Judicial Dictionary of Words and Phrases*, 6th edn, vol. 2 at p. 1253 the word "include" is described as:

> ... a phase of extension, and not of restrictive definition, it is not equivalent to 'shall mean ...
>
> 'Include' is very generally used in interpretations clauses in order to enlarge the meaning of words or phrases occurring in the body of the statute; and when it is so used, these words or phrases must be construed as comprehending, not only such thing as they signify according to their natural import but also those things which the interpretation clause declares that they shall include.

The House of Lords in *Patrick Alfred Reynolds v. The Commissioner of Income Tax* [1967] 1 AC 1 construed the word 'include' as a word of extension when it held at p. 2B of the case:

> That s. 10(1), on its true construction, and having regard to the word "including" which was a word of extension, ...

[40] It is our considered opinion that based on the above authorities, the definition of the word "royalty" ought to be taken in its widest sense and shall not be limited only to any sums or income included in s. 2 of Act 53 with regard to the definition of the word "royalty". It was therefore our finding that based on the facts, it was evident that the payments made by the respondent to the non-resident companies were for the "right to use", thus falling very well within the scope of the definition of "royalty" under s. 2 of Act 53 and accordingly, were subject to withholding taxes.

[17] Applying the same approach to s. 7(4) of the Act, this court finds that the word "includes" when read together with the words "... **and any place** (emphasis added) to which the public has or may have access" has the effect of expanding the scope of the spaces or places that can be a public place rather than restricting it only to the places that appear in that provision. It would be pertinent to also refer to s. 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) where the word "public place" is defined as follows:

> "public place" includes every public highway, street, road, bridge, square, court, alley, lane, bridle way, footway, parade, wharf, jetty, quay, public garden or open space, and every theatre, place of public entertainment of any kind or other place of general resort to which admission is obtained by payment or to which the public have access;

[18] It can be seen from the definition under s. 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) that a public place includes not only areas used for access but includes other locations and facilities to which the public has access. Although the examples of the places used in s. 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) are more expansive, the generality of the words that follow demonstrates that the space that can be considered a public place is not restricted and is limitless for as long as the place is of general resort and can be accessed either by payment or by public access. Thus, in this court's view the words "... **and any place** (emphasis added) to which the public has or may have access" in s. 7(4) of the Act, does not serve to limit the scope of public places to only those areas described before that but extends also to all other places where the public has access whether admission is through payment or gratuitously. In *PP v. Chen Geok Len & Anor* [1966] 1 LNS 134; [1967] 1 MLJ 59, Lee Hun Hoe J (as he then was) held a "public place" to be as follows:

> I come now to the second ground of appeal. In *The Queen Wellard* (1884) 14 QBD 63, 66 the prisoner was convicted of indecently exposing his person to some small girls in a place which was out of sight off a public footpath. The prisoner had gone to the place with several little girls though without legal right to go there. This was a place where persons were in the habit of going without having any strict legal right so to do and were never in any way hindered or interfered with. On a case stated his counsel submitted that the place was not a public place as the public had no right there and that a place was not public where the public had no right to be. It was held that the conviction was correct and the jury were justified in finding that the place was public. Lord Coleridge C.J. in his judgment in *Wellard*'s case stated:
>
> > It is, I concede, difficult to define affirmatively what is a public place; this place, however, is clearly so. The public did undoubtedly have access to it. I am by no means sure that at common law the publicity of the place itself is an essential element in the offence,

> and I am not inclined now to say so: it is not necessary to decide this question. It is obvious that what is a public place may vary from time to time, and what we have to consider is, was this place at the time public?

Grove J. in the same case stated:

> A public place is one where the public go, no matter whether they have a right to go or not. The right is not the question. Many shows are exhibited to the public on private property, yet they are frequented by public – the public go there.
>
> The meaning of public place, I think, depends to a great extent upon the context and upon the object of a particular Ordinance. A place may be a public place at one time and not at other times. Thus a railway carriage is a public place while being used for the reception and conveyance of passengers, but not while it lies empty in a siding. *Laugrish v. Archer* (1882) 10 QBD 44. *Wellard*'s case appears to be authority for saying that a public place would seem to include a place to which the public are accustomed to resort without being interfered with though there is no legal right to do so. *Button*'s case would seem to suggest that a place could be a public place if at the time a substantial part of the public had access to it.

[19] Returning to the facts of the present case, this court agrees with the Magistrate that "Pusat Hiburan" is a public place *albeit* based on different considerations. Whilst this court does not agree with the Magistrate that the entertainment centre is a public place merely because of the number of simulators found there, this court find that it is a public place because (i) it is situated in a shopping mall that is accustomed to be visited by the public; (ii) there is no evidence that access to the place is limited only by way of invitation, payment of access fee or membership; and (iii) each of the appellants' own evidence that they had walked into and wandered within the "Pusat Hiburan".

[20] Hence, based on the above consideration and finding, this court does not agree with learned counsel for the appellants that a reference to the definition of "common gaming house" under s. 6 of the Act and definition of "place" under s. 2 of the Act fortifies the argument that the public place referred to in s. 7 of the Act must mean outdoor places only. In this court's view the word "place" as used in s. 6 refers to the act of gaming in a common gaming house which can be found or located in an indoor or outdoor space whilst s. 7 of the Act refers to the act of gaming in a public place that is not a common gaming house. In the present case, "Pusat Hiburan" is not a common gaming house since it is licensed to offer general entertainment and games including kiddie rides and snooker.

Whether The "Treasure Frog" Simulator Machine Is A Gaming Machine

[21] Section 2 of the Act defines "gaming" as follows:

> "gaming" with its grammatical variations and cognate expressions means the playing of any game of chance or of mixed chance and skill for money or money's worth and includes the playing of any game specified in Column 1 of the First and Second Schedules and the playing or operation of any gaming machine.

[22] It is clear by that provision that the game played must be one that involves (i) the element of chance or a mix of chance and skill; and (ii) is played for money or money's worth. Since the game the appellants were playing is a simulator machine, the definition of a "gaming machine" must also be considered. The same s. 2 of the Act defines "gaming machine" to be:

> "gaming machine" means any mechanical, electrical or electronic machine or device (including any computer program used in such machine or device), whether wholly or partly mechanically, electrically or electronically operated, that is so designed or that has been so adapted that:
>
> (a) it may be used for the purpose of playing a game of chance or a game of mixed chance and skill; and
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> (b) as a result of the playing or operation of the machine or device, winnings in money or money's worth may become payable;

[23] Hence, in establishing the offence the prosecution must prove that the "Treasure Frog" game is (i) a game of chance or mixed chance and skill; and (ii) it is played for money or money's worth. In proving this aspect of the charge, the prosecution had relied on the findings and explanation of SP3 who is the expert on gaming machines. His expertise is gazetted by the Government and the *Gazette* was tendered and marked as exh. P22. For the purposes of the trial two expert reports were tendered and marked as exhs. P12 and P13. Both SP3's credentials and reports were not challenged at the trial. In his evidence SP3 had testified that the "Treasure Frog" game was a game that involved the element of chance and it was played for money or money's worth. Relying on the evidence of SP3 on the features of the "Treasure Frog" game, the Magistrate found that the "Treasure Frog" game was a gaming machine. After considering her deliberations on the matter and the evidence of SP2 and SP3 this court finds no reason to disturb that finding. SP3 was firm in his opinion that the "Treasure Frog" game was a gaming machine and in absence of any evidence that challenges the credibility of his evidence as an expert on the matter, this court finds that the Magistrate was correct in relying on his evidence and arriving at her findings on the issue.

Was The Game Machine Played For Money Or Money's Worth?

[24] SP3 testified that to play the "Treasure Frog" a player must buy credit points that are credited into a magnetic E-Token card. The E-Token card will then be swiped at the machine for the game to be played and that card will be held by the counter operator. The credit points have a minimum value and maximum value. For each game the player will enter the value of credit based on his choice at the minimum of 10 sen up to RM50. The value of the credit points forms the value of wager or bet in playing the game. The winnings in money or money's worth will be ten times the value of the wager or bet. Thus in this court's view, the value for playing each game is not fixed. It is not the price to play the game. Since the value paid to play is not fixed and is determined by the player then the value must be said to be a wager or bet. The opportunity to place a higher value must mean that there is an expectation of reward that is higher than the value credited to play the game. Therefore, the game cannot have been played for the pure challenge of skill, dexterity or strategy rewarded by elevation to higher levels of skill challenges as found in typical computer games. Based on the expert evidence of SP3, the "Treasure Frog" game must have been played for money or money's worth.

[25] Therefore, this court does not agree with the arguments of learned counsel for the appellants that the evidence of SP3 is based on mere speculation. SP3 was an expert on gaming machines and therefore his opinion on the features and operation of a gaming machine must be given its proper weight. In this court's view the case of *Lim Pong Joo v. Regina* [1957] 1 LNS 37; [1957] 1 MLJ 122 referred to by learned counsel for the appellants does not assist the appellants' case. In that case the court hearing on appeal found that there was no evidence from the prosecution witness as what would the prize be if the accused had won the game. Furthermore, the machine played was in a coffee shop and there is no evidence that there was an operator for the machine. Quite clearly, the facts are distinguishable from the present appeal. Here, SP3 had clearly stated that the winnings would be money or money's worth and that opinion cannot just be based on conjecture but based on his understanding of the game as a police expert witness. Furthermore, the "Treasure Frog" game was operated by an operator who supervised the playing of the game through the use of E-Token cards.

[26] To take the matter further, this court also holds the view that the evidence of SP3 equally answers the issue of whether there was evidence that playing the game involved an opportunity to the successful player to recover money or money's worth, an issue that was considered in the case of *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886; [1999] 5 MLJ 558 and referred to by learned counsel for the appellants. The issue in *Pet Far Eastern* (*supra*) however, was not on whether an offence was

committed under the Act but whether the monies paid were made pursuant to an illegal contract. The facts and issues in *Pet Far Eastern* (*supra*) and the present appeal are therefore distinguishable. Here, the use of the credit points in the E-Token card, the value of wager or bet for each game played and SP3's expert evidence are clear evidence of the fact that the game is played for money or money's worth.

Must There Be Evidence Of Payment Of Money Or Money's Worth In Proving That The Game Is A Gaming Machine?

[27] Learned counsel for the appellants further disagreed with the finding of the Magistrate that the winnings of money or money's worth is not a condition in proving that the "Treasure Frog" game is gaming machine. Learned counsel for the appellants referred to the case of *Lombard Commodities Ltd v. Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137; [2010] 2 MLJ 23 for the proposition that the word "may" in the definition of "gaming machine" means that the winnings of money or money's worth is mandatory and not discretionary. This court however, takes a contrary view and state that the word "may" in that definition means that for as long there is an expectation or prospect of payment, actual payment may not be proved. The arguments referred to by learned counsel for the appellants on the issue is misplaced because the case of *Lombard Commodities Ltd* (*supra*) is only relevant to the issue of interpretation of a statutory provision whilst the word "may" here refers not to the operation of a statutory provision but to the conduct of the game. So, whether the operator actually pays the winnings in the form of money or money's worth is not the determinant factor, it is whether there was an expectation or prospect of payment of money or money's worth if the player wins the game. It is that expectation or prospect that gives it the character of a gaming machine.

Was There An Act Of Gaming Committed By Each Of The Appellant?

[28] This court will now deliberate on the issue whether each of the appellant had committed the act of gaming. The Magistrate court was the trier of facts and unless there is cogent reason to act, an appellate court will be slow to interfere with the finding of facts by the trial court. In this court's view the Magistrate had undertaken a proper evaluation of the facts in finding that each of the appellants did play the "Treasure Frog" game at the time of arrest based on the following deliberations.

[29] SP2 testified that he saw each of the appellants seated in front of the simulators and the appellants were seen engrossed playing the games (saya mendapati mereka asyik sedang bermain). As such, his evidence was not merely based on the hearsay evidence of ASP Rusli as argued by learned counsel for the appellants. Additionally, SP3 stated in his re-examination that the first appellant's game was still in progress and had not completed.

[30] This court does not find as argued by learned counsel for the appellants any material contradictions in the testimony of SP2 that could raise any doubt on the findings of the trial court that the games played by the appellants was "Treasure Frog" and not "Darts". That issue was clarified and explained by SP2 when questioned by the prosecution.

[31] Learned counsel for the appellants went on to argue at great length that since no E-Token cards was not found on the appellants and there is no evidence to link any of the E-Token to the machines that the appellants allegedly found playing then the prosecution cannot be said to have discharged their burden of proving that the appellants did in fact play the "Treasure Frog" simulator. After considering the deliberation of the Magistrate and the collective evidence of SP2 and SP3, it is evident that the token cards are not held by the players but by the operator at the counter. That SP3 did not see any of the appellants pay any monies for the credit points to be loaded to the E-Token cards does not negate SP2's evidence that he saw the appellants being engrossed in the game. Being engrossed in playing in the game can only mean that the appellants were not just toying with the simulator but was purposefully playing the game. Since this court finds that the payment of money or money's worth need not be proven, the lack of any evidence that the appellants did actually receive any winnings in money or money's worth is therefore not critical in proving the offence.

[32] In addition, this court is satisfied that the Magistrate had critically evaluated the evidence of the appellants before arriving at her finding that each of the appellant's explanation as to what that lead them to sit at the respective simulators were incredible and not capable of raising any reasonable doubt in the prosecution's case.

On Whether The 'Treasure Frog' Simulator Was Licensed

[33] Learned counsel for the appellant had also argued that the "Pusat Hiburan" was licensed by the local authorities and the "Treasure Frog" machines were also licensed. Since they were licensed then they cannot be regarded as gaming machines.

[34] Pertaining to this issue it would be necessary to consider the evidence of SD4, the licensing manager for Cosmic Family Entertainment Center. In his evidence SD4 stated that the "Pusat Hiburan Keluarga Classic, Cosmic Sdn Bhd" was licensed by the local authorities and that all the games and simulators were also licensed. Copies of the licenses were tendered through SD4 but were not admitted as the defence exhibit since SD4 was not the issuer of the licenses. Based on the notes of proceedings SD4 was the last witness for the defence and no witness from the local authority was called to give evidence with regards to the licenses. Since the licenses were not

admitted as part of the evidence for the defence then the licenses cannot be considered although included in vol. 3 of the record of appeal. Hence, there was no evidence that the "Treasure Frog" simulators were actually licensed by the local authorities and even if indeed licenses were issued, whether the local authorities were aware that the "Treasure Frog" simulators were gaming machines within the meaning of s. 2 of the Act. Therefore, in absence of any direct evidence from the local authorities regarding the licenses and the "Treasure Frog" simulators, the content and purpose of the "Treasure Frog" simulator game as explained by SP3 stood unrebutted by any other evidence. In any event, even if the licenses in IDD20 (a-g) were to be considered, none of the licenses identified treasure frog' as a simulator game that was licensed. At p. 103 vol. 3 of the record of appeal, the copy of the license only referred to "Mesin Simulator (Permainan Kanak-kanak)" without naming the game. Hence, although the "Pusat Hiburan" may have been licensed as an entertainment centre there is no evidence that the "Treasure Frog" simulator game was actually approved and licensed. Therefore, this court cannot find that the issue as argued by learned counsel for the appellants had raised any reasonable doubt in the prosecution's case.

Decision

Against Conviction

[35] In conclusion, after considering the totality of the evidence presented before the trial court and the grounds of the Magistrate's decision, this court is satisfied that as found by the Magistrate, the appellants (i) had played the "Treasure Frog" simulator game; (ii) the game was not played merely for the purposes of entertainment; and (iii) the game was played for money or money's worth. The Magistrate was correct in arriving at her decision in finding each of the appellant guilty as charged. Although the Magistrate may have in her evaluation referred to legal authorities that were not directly relevant and applicable, she still however, arrived at the right conclusion. The appeals by each of the appellant against conviction is therefore dismissed and the decision of the Magistrate on conviction is hereby affirmed.

Against Sentence

[36] With respect to the appeal against sentence, this court does not agree that the offence committed by each of the appellant warranted the sentence of both imprisonment and maximum fine. This court takes into consideration that (i) that each of the appellant is a first offender; (ii) this is not an offence that involves any victim; (iii) this is not an offence that involves violence; (iv) that the appellants are not operators of the game; and (v) that they had committed the offence individually and not collectively as a group where bets or wagers were pooled.

[37] Additionally, this court takes judicial notice that there have been Covid-19 infections in prisons in the State of Penang and as such, incarceration for the first appellant (aged 56) and the second appellant (aged 76) would only expose them to potentially serious health risks.

[38] On that premise, this court does not agree that the sentence of imprisonment is appropriate. The imprisonment sentence for each of the appellant it is therefore set aside.

[39] With respect to the fine imposed, this court does not find any reason why the maximum fine of RM5,000 should be imposed and is excessive in the circumstances of this appeal. Notwithstanding that the trial court had convicted the appellants at the end of a full trial, a maximum fine should only be reserved for serious and repeat offenders. The amount of fine is hereby substituted with the amount of RM1,500 for each of the appellant, in default one month imprisonment.